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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11

12 JAMES "JIM" OWENS

13 Plaintiff,

14 v.

15 COUNTY OF LOS ANGELES, et al.,

16 Defendants
17

CASE NO: CV08-07116 DMG (Ex)

**DEFENDANT'S RESPONSE TO
PLAINTIFF'S BRIEF IN OPPOSITION
TO DEFENDANT'S PROPOSED
STATEMENT OF THE CASE**

Trial Date: September 18, 2012

18
19 **1. NOT ADVISING THE JURY OF THE FINDING THAT THE FORCE**
20 **USED BY DEPUTY CHESHER WAS NOT EXCESSIVE WOULD**
21 **BE THE UNDULY PREJUDICIAL ACT**
22

23 There is no justification for the plaintiff's demand that the decision of the jury at the
24 first trial of this matter on the issue of excessive force be hidden from the new jury that will
25 hear the second trial. This Court should reject this blatant attempt by the plaintiff to undo the
26 work of that first jury in the hope of giving the plaintiff a "second bite" of the excessive force
27 "apple".
28

The real purpose of plaintiff's opposition to the defendant's simple and neutral

1 statement of the decision reached by the jury at the first trial – “It also has been determined as
2 a matter of law that Deputy Cheshier did not violate Mr. Owen’s rights by using excessive
3 force when he physically contacted Mr. Owens during the detention and search.”
4 (Defendant’s Proposed Case Statement [Docket 213], page 1, lines 26-28) – is revealed
5 in a sentence appearing on page 5 of the plaintiff’s opposition, at lines 12-15:

6 “This sort of information would make any reasonable person, other than an
7 expert on the law of excessive force, assume that the conduct of the defendant,
8 though perhaps unconstitutional, was non violent, perhaps even inconsequential
9 and infer that it was unlikely to cause a serious injury.”

10 Instead, the plaintiff wants to have the jurors to make the opposite assumption: i.e. that
11 since the actions of Deputy Cheshier were “unconstitutional”, his actions must have been
12 violent, consequential, and thus likely to have caused serious injury, exactly as the plaintiff
13 has testified.

14 The plaintiff cannot have his cake and eat it too. He cannot insist that the jury be told
15 that, as a matter of law, Deputy Cheshier acted unconstitutionally, and then hide from the new
16 jury that, as a matter of established fact, the force Deputy Cheshier used during that
17 unconstitutional conduct did not rise to the level of excessive force.

18 The sentence from plaintiff’s opposition quoted above indicates that the plaintiff wants
19 to avoid having to meet his burden of proof. The defendant has no burden to show that his
20 actions during the course of his detention and search of the plaintiff did not cause the plaintiff
21 injury. Rather, it is up to the plaintiff to establish, by a preponderance of the evidence, what
22 actions Deputy Cheshier engaged in during the course of his detention and search of the
23 plaintiff and to establish that *those* actions caused the plaintiff to suffer the injuries of which
24 he now complains.

25 In other words, it is the plaintiff’s burden to show that the defendant’s actions were,
26 in fact, violent, consequential, and likely to cause serious injury. Until – *and unless* – the
27 plaintiff introduces sufficient evidence to meet that burden, it is not only appropriate,
28 but mandatory, that the jurors assume that Deputy Cheshier’s actions were indeed “non

1 violent, ... inconsequential and ... unlikely to cause a serious injury.”

2
3 **2. ADVISING THE JURY OF THE FINDING THAT THE FORCE**
4 **USED BY DEPUTY CHESHER WAS NOT EXCESSIVE WILL NOT**
5 **CONFUSE THE JURORS OR THE ISSUES,**

6 Contrary to the plaintiff's assertion (made without any factual support), there is
7 absolutely no reason to believe that advising the jury of the simple fact that it has pre-
8 viously been determined that Deputy Cheshier did not use excess force will in any way
9 confuse the jurors or the issues. To the contrary, such an instruction will eliminate from
10 the jurors' minds any thought they might have that they need to decide whether the level
11 of force used by Deputy Cheshier was lawful. The jurors will thus be able to focus on the
12 very simple, straight-forward question that is actually at issue in this second trial: did the
13 manner in which Deputy Cheshier conducted the detention and search of the plaintiff cause
14 the plaintiff to suffer the injuries of which he now complains?

15
16 **3. THE PLAINTIFF'S DEMAND FOR PUNITIVE DAMAGES MAKES**
17 **IT ESSENTIAL THAT THE JURY BE ADVISED OF THE FINDING**
18 **THAT THE FORCE USED BY DEPUTY CHESHER WAS NOT**
19 **EXCESSIVE**

20 Because the plaintiff intends to seek punitive damages against Deputy Cheshier for his
21 conduct in this incident, it is absolutely essential that the jury be told that it has been found
22 that the force used by Deputy Cheshier was not excessive. It must be clear to the jury that it
23 cannot assess punitive damages against Deputy Cheshier based on the fact that he used some
24 level of force during the detention and search of the plaintiff, or based on the amount of force
25 he used during the detention and search. This is because it has been established that the
26 force used was not excessive. Since it was not excessive, it cannot form the basis for an
27 award of punitive damages.

28 ///

1 But if this is not explained to the jury, there is a distinct possibility that one or more of
2 the jurors may decide that the use of force *is* a basis for awarding punitive damages against
3 Deputy Cheshier. That can only be prevented if the jury is advised as the defendant has
4 requested.

5
6 **CONCLUSION**

7 For all these reasons, it is essential that the jury be advised, as requested by the
8 defendant, that “[i]t also has been determined as a matter of law that Deputy Cheshier did not
9 violate Mr. Owen's rights by using excessive force when he physically contacted Mr. Owens
10 during the detention and search.” (Defendant's Proposed Case Statement [Docket 213], page
11 1, lines 26-28.)

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13 Dated: September 14, 2012

Respectfully submitted,

14 **MANNING & KASS**
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